

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)
)
Amendment of the Commission's)
Rules To Preempt State and Local)
Regulation of Tower Siting For)
Commercial Mobile Services Providers)

RM - 8577

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

COMMENTS OF ENCOMPASS, INC.

Encompass, Inc. ("Encompass"), by its undersigned counsel, hereby submits its Comments on the Petition for Rulemaking ("Petition"), filed by the Cellular Telecommunications Industry Association ("CTIA") on December 22, 1994. In its Petition, CTIA requests that the Commission issue a Notice of Proposed Rulemaking ("NPRM") proposing to preempt state and local government regulation of antenna tower siting for commercial mobile radio service ("CMRS") providers, including PCS providers. At issue in this proceeding is whether the numerous state and local regulations governing the construction and use of antenna towers for CMRS would impede entry or network development of CMRS. As a potential provider of PCS, Encompass has a direct interest in this proceeding.

As explained below, unless the Commission establishes guidelines for preemption of state and local regulation of antenna tower siting and preempts those regulations that, in effect, would bar or inhibit a PCS provider's entry into the wireless service market, PCS and all of the public interest benefits that this new wireless service promises to consumers will be delayed. Burdensome state and local antenna tower siting regulations also will have an especially damaging affect on entrepreneur block PCS licensees, who will be entering the

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wireless market and seeking antenna tower siting locations after the "A" and "B" block licensees enter the market. Encompass therefore urges the Commission to initiate an NPRM to establish guidelines for preemption of state and local antenna tower siting regulations that in effect, would bar or inhibit a PCS provider's entry into the wireless market.

Section 332 of the Communications Act of 1934 provides that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service."^{1/} Section 332 reserves to state and local governments authority to regulate "other terms and conditions," including "facilities siting issues (*e.g.*, zoning),"^{2/} but, by regulating other terms and conditions of CMRS, state and local governments must not indirectly bar or inhibit a PCS provider's entry into the wireless market.

Experience in the wireless market has been that states and localities at times have imposed onerous regulations on the construction and use of antennas. It is therefore imperative that the Commission adopt guidelines for the preemption of those state and local antenna tower siting regulations that, in effect, would bar or severely inhibit a PCS provider's entry into the wireless market. These guidelines would serve notice on state and local governments that antenna tower siting regulations must be narrowly drawn to minimize the impact of these regulations on a CMRS provider's entry into the wireless market.

The Commission has previously found that state and local antenna regulations can have the effect of barring or inhibiting the provision of satellite communications, wireless

^{1/} 47 U.S.C. § 332(c)(3)(A).

^{2/} *Id.* See P.L. No. 103-66, H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. (1993).

cable, and amateur radio services to consumers. Now, as PCS providers seek to enter the wireless market, they too may face a myriad of state and local antenna tower siting regulations that potentially could bar or inhibit their efforts to provide a service that the Commission has authorized.

When state and local regulations thwart the development of federally authorized communication services, the Commission has taken action. For example, the Commission adopted guidelines for the preemption of state and local regulations that discriminate against certain types of satellite earth station antennas.^{3/} In establishing these guidelines, the Commission concluded that certain state and local antenna regulations interfere with the federal interest in allowing consumers to construct and use antennas to receive satellite delivered signals.^{4/} Similarly, in the amateur radio service, the Commission adopted a policy for limiting state and local regulation of antennas and support structures that have the effect of precluding participation in amateur communications services.^{5/} The Commission clearly has opposed overly broad regulations, stating "local regulations which involve placement, screening, or height of antennas based on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose."^{6/} The

^{3/} 47 C.F.R. § 104.

^{4/} See *Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations*, 59 Rad. Reg. 1073 (1986).

^{5/} 47 C.F.R. § 97.15(e).

^{6/} *Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities*, 101 FCC 2d 952, 960 (1985).

Commission has studied the potential of local regulations to inhibit competitive service offerings. In its 1990 Report to Congress, the Commission recognized that "in many localities, alternative media distributors face land use regulations that prohibit or restrict the use of antennas and other receiving equipment."^{2/}

Now, as PCS providers seek to build networks to provide wireless services, they too will confront the myriad of state and local antenna tower siting regulations that, in effect, may bar or severely inhibit their ability to provide competitive wireless services to consumers. Thus, in light of the Commission's experience with onerous state and local regulation of antennas in the satellite communications, wireless cable, and amateur radio services that limited its national policy goals, the Commission should consider taking similar action for CMRS by issuing an NPRM in this proceeding. The NPRM should propose guidelines for the preemption of those state and local antenna tower siting regulations that impermissibly regulate a PCS provider's entry into the wireless market. By establishing such guidelines, the Commission will make clear its strong federal policy encouraging competitive entry into the wireless market. Such action will assist rapid deployment of PCS services on a nationwide basis by limiting state and local regulations that would have the effect of delaying

^{2/} *Competition, Rate Regulation and the Commission's Policies Relating to the Provision of Cable Television Service*, Report, 5 FCC Rcd 4962, 5034 (1990). According to the Commission, "these regulations have taken many forms, including the imposition of (1) requirements for building permits for the installation of satellite dishes or antennas of more than a particular size (only 2 feet in diameter in one instance), (2) extensive regulatory review procedures as a condition to allowing the installation of antennas, and (3) height restrictions on receiving equipment. Some localities even prohibit the use of any outdoor antennas."

or prohibiting entry by competitive providers. Such a result is in the public interest, and Encompass therefore supports Commission initiation of a rulemaking proceeding.

Respectfully submitted,

ENCOMPASS, INC.

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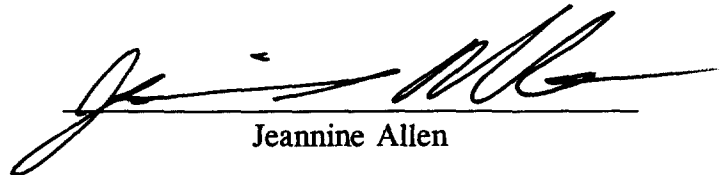
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Date: February 17, 1995

CERTIFICATE OF SERVICE

I, Jeannine Allen, hereby certify that on this 17th day of February, 1995, copies of the Comments of Encompass, Inc. in support of FCC preemption of state and local tower site regulations were delivered by first-class mail or by courier to all parties on the following service list.



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